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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 982

SIGURD N. HERSLOFF AND JOSEPH J. STERN, TRUSTEES, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. 18–27) is reported at 310 F. 2d 947.

### JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1962, and a petition for rehearing was denied on February 6, 1963. The petition for a writ of certiorari was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

### QUESTION PRESENTED

Whether the Court of Claims correctly ruled that two corporations, dissolved under the law of their

incorporation, were carrying on sufficient activities through their liquidating trustees to remain in existence for federal income tax purposes.

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the 1939 and 1954 Internal Revenue Codes and the Treasury Regulations are set forth in the Appendix, *infra*, pp. 11–13.

## STATEMENT

This is a suit for refund of income taxes involving two affiliated South Dakota corporations, United States Asphalt Refining Company (hereinafter referred to as Asphalt) and Interocean Oil Company, the parent of Asphalt (hereinafter referred to as Interocean). Asphalt was dissolved by a South Dakota court in 1928, and, pursuant to South Dakota law, two of its surviving directors became "trustees of the creditors and stockholders." When Interocean dissolved in 1937 because of the expiration of its corporate charter, the same two men became its trustees (Pet. 27–28). Thereafter, by a series of orders of the South Dakota court, successor trustees were appointed on the death of earlier trustees so that the present petitioners, Sigurd N. Hersloff and Joseph J. Stern, are now the duly appointed trustees (Pet. 28–30).

During World War I both Asphalt and Interocean lost chartered steamers, which they owned, through the acts of Germany. In August 1926, prior to the dissolution of either corporation, the Mixed Claims Commission, which was set up to arbitrate claims for the destruction by Germany of American property during World War I, made an award to both corporations

for their lost vessels: $150,000, plus interest, to Asphalt and $447,000, plus interest, to Interocean. No funds were available in 1926, but payments on the awards were authorized by the Settlement of War Claims Act of 1928, 45 Stat. 254. Under this Act and its amendments, the Treasury made intermittent payments of principal and interest to the two corporations and, after their respective dissolutions, to the trustees. In February 1953, the United States concluded with Germany a debt settlement agreement under which the latter was to make annual payments on such awards up to a particular sum over a 26-year period, beginning on April 1, 1953, and ending in 1979 (Pet. 31–34).

The attorneys who represented Asphalt and Interocean before the Mixed Claims Commission sued for their fees. A compromise decree was entered in August 1931, which awarded the attorneys a share of the amounts already paid the two corporations and also established their right to recover from the corporations and the trustees a percentage of all amounts thereafter paid on the awards. The decree also gave the attorneys an equitable lien on all funds to be used for such payments. To enforce these rights, the decree provided that the Treasury was to deliver payments on the awards to the companies and trustees only through the Riggs National Bank in Washington; that bank was to forward the check or warrant to its New York correspondent for endorsement by the payees (the trustees) and return it to Riggs to be cashed and disbursed as required by the decree, *i.e.*, a percentage was to be paid to the attorneys and the rest

to the companies and trustees. The corporations and trustees were enjoined from seeking from the Treasury payment in any other manner (Pet. 34–36).

During or before 1939, the trustees assigned various other portions of the payments on the awards to other attorneys who had rendered legal services to them. Before and including the taxable years involved here, the trustees received payment through the system set up by the 1931 decree, satisfied the bank fees, trustees' commissions, and sums due the various attorneys pursuant to the decree and assignments, and then paid over the balance to the stockholders of Interocean pro rata (Pet. 36–37).

Asphalt had no assets, potential or actual, aside from the award by the Mixed Claims Commission. However, when Interocean's charter expired in 1937, it had certain potential assets, two of which are now relevant. It had a claim against the British Government, which had requisitioned two tankers from Interocean in World War I, for paying charter hire at less than the market rate. In 1927, the State Department rejected the claim as invalid and refused to present it to Great Britain. Nevertheless, Interocean's attorneys persistently continued to press it. A new claim was filed with the State Department in 1938 and actively pursued. There were conferences in 1950, and the claim was again rejected in 1951. In 1956, Interocean's trustee referred the claim to a Washington attorney who investigated it and discussed it again with the State Department in March 1958. He reported to the general counsel for the trustees that the Department was willing to arbitrate

the matter, but the general counsel decided to abandon it since previous arbitrations had held the rates paid by the British to be adequate. Another possible asset consisted of 15,000 acres of oil land and 150,000 acres of timberland in the Dominican Republic. These appear to have been of little value, but the trustees made some efforts to realize on them. Further investigation by the trustees' counsel in 1951 and 1952 revealed either that Interocean did not originally have title or that it had been lost through non-payment of taxes or confiscation (Pet. 38–40).[1]

The taxpayers paid corporate income taxes in behalf of Asphalt and Interocean on the interest on the original awards received in 1949, 1953, and 1954. On November 5, 1956, taxpayers filed claims for refund of these taxes. When these claims were disallowed on April 10, 1958, petitioners brought this suit for refund (Pet. 42). The Court of Claims held that under the facts in this case the two corporations remained in existence so as to be subject to the federal corporate income tax.

## ARGUMENT

The only question presented in this case is whether these two South Dakota corporations (Asphalt and Interocean), which were dissolved under South Dakota law, remained in existence for federal income tax purposes during the years 1949, 1953, and 1954. The courts have consistently held that a corporation's

[1] Another asset, the "Carteret property" in New Jersey, is not now pertinent because it was finally disposed of in 1947, prior to the earliest taxable year (1949) in the present case (Pet. 41).

existence for tax purposes continues, despite dissolution, during the period when the corporation is being liquidated by the corporation, by a receiver, by trustees, or by other agents of the corporation. *Wood Harmon Corp.* v. *United States,* 311 F. 2d 918 (C.A. 2); *J. Ungar, Inc.* v. *Commissioner,* 244 F. 2d 90 (C.A. 2); *O'Sullivan Rubber Co.* v. *Commissioner,* 120 F. 2d 845 (C.A. 2); *Northwest Utilities Securities Corp.* v. *Helvering,* 67 F. 2d 619 (C.A. 8); *First Nat. Bank of Greeley, Colo.* v. *United States,* 86 F. 2d 938 (C.A. 10); see also *Caswell* v. *Commissioner,* 36 B.T.A. 816; *Smith* v. *Commissioner,* 26 B.T.A. 1178. As the Second Circuit aptly stated (*O'Sullivan Rubber Co.* v. *Commissioner, supra,* 120 F. 2d at 847), "the declining years of a corporation are part of its life; * * *. The operation of a going concern is not a condition precedent to tax liability."

These determinations are consistent with the applicable regulations.[2] Treasury Regulations 111, Section 29.22(a)–20 provided:

> When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes.

---

[2] The two Regulations quoted are applicable to the year 1949. Treasury Regulations 118, Sections 39.22(a)–20 and 39.52–1(b) are applicable to the year 1953 and Treasury Regulations on Income Tax (1954 Code), Section 1.6012–2(a)(2) are applicable to the year 1954. All three Regulations, as well as their predecessors, are substantially the same.

Section 29.52–1 provided:

> If the corporation has valuable claims for which it will bring suit during this period [following dissolution], it has retained assets, and it continues in existence.

Essentially the same Regulations have been held reasonable constructions of the statutory sections under which they were promulgated. *O'Sullivan Rubber Co.* v. *Commissioner, supra; Northwest Utilities Securities Corp.* v. *Helvering, supra.* Moreover, the repeated reenactment by Congress of the pertinent statutory sections may be considered as legislative approval of Section 29.22(a)–20 of the Regulations, which was first promulgated in 1921 (Treasury Regulations 45 (1920 ed.), Art. 547) and have continued without any material change to the present. *Helvering* v. *Winmill,* 305 U.S. 79, 83; *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 99; *O'Sullivan Rubber Co.* v. *Commissioner, supra,* 120 F. 2d at 847.

The Court of Claims properly applied these Regulations and cases to the relevant facts. The record shows that, at the time of their dissolution, Asphalt and Interocean had as assets awards from the Mixed Claims Commission for their lost vessels, the first payments of which they had already received (Pet. 31–33). These assets were not distributed to the shareholders, but were retained through the years involved by the liquidating trustees for purposes of collection (Pet. 19–20, 37). Moreover, as a result of the successful prosecution of these claims prior to their dissolution, the corporations were in debt to the attor-

neys who represented them. The amount and nature of the satisfaction of this indebtedness were resolved by a compromise court decree in 1931 (Pet. 34–36). The fact that payment of the indebtedness was made contingent upon the corporations' receipt of award payments did not in any way alter the basic fact of the existence of this corporate indebtedness which the liquidating trustees were responsible for satisfying. Interocean also retained two other potential assets, the claims for which the trustees have since "persistently pressed" (Pet. 39). The claim against Great Britain later involved investigation, conferences at the State Department, and referral to outside counsel for evaluation (Pet. 39–40). The claim to property in the Dominican Republic subsequently required testing land for oil and determining title to the property (Pet. 40).

After dissolution, the corporations incurred other debts to attorneys for various legal services, which the trustees have paid (Pet. 36). As late as 1960, the trustees' Statement to Stockholders showed separate disbursements to seven different attorneys or law firms (Pet. 52–54). In addition, since the dissolutions of the two corporations, the trustees have continued (1) to receive payments through the system set up by the compromise decree of 1931, (2) to satisfy the bank fees and trustees' commission, and (3) to pay the balance to the stockholders of Interocean pro rata (Pet. 37).

All these activities of the trustees to secure and collect the assets of the two corporations and satisfy

their liabilities—activities which required the exercise of considerable discretion—support the lower court's conclusion that for federal tax purposes the two corporations remained in existence. These were not dormant or dead corporations which the Commissioner of Internal Revenue attempted to disinter. To the contrary, they remained in continuous existence from the dates of their dissolutions. That this existence continued for a long period of time after the corporations ceased the active conduct of their business certainly does not by itself necessitate, as taxpayer urges (Pet. 16–17), the termination of their taxability as corporations. As long as the liquidating trustees continued to secure and collect assets, pay debts, and make disbursements, the trustees were, in the words of the Regulations, "trustees in dissolution" and the corporations remained in the process of liquidation subject to federal income tax.

Nor is there any merit to taxpayers' contention (Pet. 11) that there is a conflict in the cases which requires resolution by this Court.[5] In each of the three cases on which taxpayers principally rely, the courts specifically found that the corporation involved had distributed all of its assets, had no debts, made no disbursements, and therefore had gone out of existence. Here the corporations, through their liquidating trustees, retained assets, collected payments resulting from them, paid off debts, and made disbursements to stockholders.

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[5] *Gold Metal Process Co.* v. *Commissioner*, 247 F. 2d 864 (C.A. 6); *Commissioner* v. *Henry Hess Co.*, 280 F. 2d 553 (C.A. 9); *Telephone Directory Advertising Co.* v. *United States*, 142 F. Supp. 884 (C. Cls.).

## CONCLUSION

For the reasons given, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1963.

## APPENDIX

Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)):

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property * * * or gains or profits and income derived from any source whatsoever. * * *

* * * * *

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporation of whose business or property they have custody and control.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, * * *:

* * * * *

SEC. 6012. PERSONS REQUIRED TO MAKE RETURNS OF INCOME.

* * * * *

(b) *Returns Made by Fiduciaries and Receivers.*—

* * * * *

(3) *Receivers, trustees and assignees for corporations.*—In a case where a receiver, trustee in bankruptcy, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

* * * * *

Treasury Regulations 111 (1939 Code):

SEC. 29.22(a)-20. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. * * *

SEC. 29.52-1. *Corporation Returns.*—Every corporation not expressly exempt from tax must make a return of income, regardless of the amount of its net income. * * * A corporation having an existence during any portion of a taxable year is required to make a return.

> If a corporation was not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is required to make a return for that fractional part of a year during which it was in existence. A corporation is not in existence after it ceases business and dissolves, retaining no assets, whether or not under State law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up its affairs, such as for the purpose of suing and being sued. If the corporation has valuable claims for which it will bring suit during this period, it has retained assets, and it continues in existence. * * *

The pertinent provisions of Treasury Regulations 118 (1939 Code), Sections 39.22(a)–20 and 39.52–1(b), and Treasury Regulations on Income Tax (1954 Code), Section 1.6012–2(a)(2) are substantially similar to the provisions of Treasury Regulations 111, Sections 29.22(a)–20 and 29.52–1 quoted above.

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